86-332

No.

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS A. MOONEY, d/b/a BETHEL STEEL CO.,
a Sole Proprietorship,
(Louis A. Mooney and Norma Jean Mooney, his wife),
Petitioners,

v.

GREATER NEW CASTLE DEVELOPMENT CORPORATION,
a Pennsylvania Non-Profit Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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35W

QUESTIONS PRESENTED

Whether the Supreme Court of Pennsylvania has violated the due process provision of the Fourteenth Amendment when it permits without a hearing the seizure of property rights by a private non-profit corporation which is funded in part by state funds.

PARTIES

In addition to those parties listed in the caption of the case,[1] the party making an *Amicus Curiae* appearance in the proceeding before the Supreme Court of Pennsylvania was:

(1) Pennsylvania Industrial Development Authority.[2]

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[1] Respondent, Greater New Castle Development Corporation, is a Pennsylvania Non-Profit Corporation, established to serve business development through financing obtained from local banking institutions and the Pennsylvania Industrial Development Authority.

[2] Pennsylvania Industrial Development Authority Act of 1956, May 17, P.L. (1955), 73 Purdon's Statutes § 301 et seq.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	9
APPENDIX	1a
APPENDIX B	2a
APPENDIX C	10a
APPENDIX D	15a

TABLE OF AUTHORITIES

CASES: Page

Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed. 2d 554, 92 S.Ct. 1983 (1972) 6, 7, 9

North Penn Consumer Discount Co. v. Shultz, Pa. Super, 378 A2d 1275 (1977). 7

CONSTITUTION AND STATUTES:

Fourteenth Amendment 1, 4, 5, 7, 9

28 U.S.C. 1257. State Courts; appeal; certiorari. 1

Pennsylvania Industrial Development Authority Act of 1956, May 17, P.L. (1955) 1609. ..... 2, 3

MISCELLANEOUS:

Pennsylvania Rules of Civil Procedure, Rule 2971(a) 7, 8

JURISDICTIONAL STATEMENT

On June 3, 1986, the Supreme Court of Pennsylvania entered judgment against Louis A. Mooney, d/b/a Bethel Steel Company, Louis A. Mooney and Norma Jean Mooney, his wife, reversing the judgment of the Superior Court of Pennsylvania and the Court of Common Pleas of Lawrence County, Pennsylvania.

The Opinion of the Supreme Court of Pennsylvania is reported at 510 A2d 344 (Pa. 1986), and the Opinion of the Superior Court is reported at 434 Pa. Super. 627, 494 A2d 491 (1986).

Jurisdiction to review this judgment by Writ of Certiorari is conferred upon this Court by 28 U.S.C. 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari, where . . . the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is especially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Pennsylvania Industrial Development Authority Act was enacted in 1956 by the Commonwealth of Pennsylvania for the public purpose of alleviating unemployment by the promotion and development of industrial and manufacturing enterprises.[3] The procedure followed by the participants of any approved project was for the individual or private corporation to convey title to their real estate to the local industrial development agency.[4] This local agency then arranged financing for the approved project from local banking institutions and from the Pennsylvania Industrial Development Authority, herein P.I.D.A. The local industrial development agency then entered into a lease arrangement with the individual or private corporation. The lease payments corresponded and

[3] The Act was directed specifically to areas of critical unemployment. Funds for use under the Act and the Administration of the Act were granted to the Pennsylvania Industrial Development Authority.

[4] The Respondent, the Greater New Castle Development Corporation, was established for the purpose of receiving money from P.I.D.A. for use in the New Castle area.

were equal to the monthly mortgage payments the local industrial agency made to the banking institutions and to P.I.D.A. After completion of all lease payments, the real estate was then returned to the individual or to the private corporation.

Neither the mortgage instruments nor the lease agreement contained any language to the effect that the real estate was to be conveyed back to the individual or private corporation, although, upon completion of the lease payments, this conveyance was made in each case. The lease agreement contained a paragraph expressly authorizing the industrial development agency to confess judgment against the lessee, to issue a writ of possession against tenant, or to reenter without notice and expel the tenant from the premises.

The Petitioners, on October 21, 1970, conveyed their real estate to the Respondent after receiving approval for a project established in accordance with the Pennsylvania Industrial Development Authority Act. Respondent entered into a mortgage of the real estate with local banking institutions on October 28, 1970, leased back the premises to the Petitioners on December 4, 1970, and executed a second mortgage to P.I.D.A. on January 22, 1971.[5]

Petitioners made regular monthly lease payments until December 1, 1977, when financial difficulties caused Petitioners to default on the lease payments. Petitioners attempted to sell the real estate and premises on several occasions and attempted to refinance the mortgages subsequent to the default. On Novem-

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[5] The Tenant, Petitioners, on January 14, 1970, subordinated their rights in the lease agreement to the P.I.D.A. mortgage of January 22, 1970.

ber 7, 1978, Petitioners were informed by Respondent that it had taken possession of the leased premises and that the lease was terminated.[6]

On July 20, 1979, Petitioners instituted an action in Equity in the Court of Common Pleas of Lawrence County, Pennsylvania, requesting that the Court declare the Respondent to be a Trustee for Petitioners, that Respondent account to the Petitioners for all monies received, that Respondent reconvey the premises to Petitioners when the lease agreement was paid in full, and that Respondent pay Petitioners all excess lease payments.

The case was submitted to the Court of Common Pleas sitting in Equity on stipulated facts and briefs. Before the Court of Common Pleas, Petitioners argued that the action of Respondent in seizing possession of the premises without benefit of notice and without benefit of an opportunity to be heard violated Petitioners' right to due process of an opportunity to be heard under the Fourteenth Amendment of the Constitution. The Trial Court did not discuss the constitutional issue since it found that under the stipulated facts, the Respondent was a Trustee and ordered the Respondent to account for all monies received, to reconvey the premises to Petitioners when all mortgage obligations were paid in full, and to pay over all money to Petitioners in excess of the mortgage debt received from any foreclosure sale.

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[6] Even after the Respondent took possession of the premises, Petitioners continued their efforts for several months to sell the premises and to refinance the mortgages. When Respondent relet the premises, Petitioner filed suit in Equity.

On March 1, 1985 the Superior Court of Pennsylvania affirmed the order of the Court of Common Pleas of Lawrence County. Petitioners in their brief to the Superior Court preserved the constitutional issue of the violation of the Fourteenth Amendment by presenting the issue in a counterstatement of questions to be considered and by arguing the said violation through its brief. The Superior Court in affirming the Common Pleas Court did not discuss the constitutional issue.

On June 3, 1986, the Supreme Court of Pennsylvania reversed the Superior Court and the Common Pleas Court and found in favor of the Respondent. Petitioners presented in their brief the same constitutional issue as previously submitted in the two lower courts, however, in footnote number 4, the Supreme Court mistakenly noted that the due process issue was presented by Petitioners, but states that the Petitioners failed to preserve the constitutional issue before the Superior Court and cites a statement by the Superior concerning this issue. However, the statement by the Superior Court was in reference to an issue attempted to be presented by Respondent and not to the issue of the due process violation properly raised and preserved by the Petitioners.

ARGUMENT

I. The Decision Of The Supreme Court Of Pennsylvania Has Violated Petitioners' Fourteenth Amendment Rights of Due Process.

The decision and order of the Court of Common Pleas of Lawrence County and the subsequent affirmance of that order by the Superior Court of Pennsylvania preserved all the rights, interests, and

equities of Petitioners in the property subject to the lease-back arrangement with Respondent. The order of the lower court required an accounting of the monies received by the Respondent under the lease; that is, whether or not all monies were applied to pay the mortgages, and also provided Petitioners with an opportunity to be heard at a foreclosure proceeding while preserving the equities of Petitioners in the event of a foreclosure sale.

In reversing the lower court, the Supreme Court of Pennsylvania has deprived Petitioners of their property right and interest without providing Petitioners with an opportunity to a due process hearing. The Supreme Court has based its reasoning, upon the contractual obligations of the two parties.[7] In effect, the Supreme Court stated that the Petitioners' failure to discharge their duties and obligations under the lease gave Respondent the right to take possession of the Petitioners' property without notice and without the necessity of filing any writ of ejectment or writ of possession.[8] This decision violated Petitioners' right to due process.

II. The Decision Of The Supreme Court Of Pennsylvania Conflicts With Decisions Of The United States Supreme Court And With Other Pennsylvania Decisions.

The decision of the Supreme Court of Pennsylvania has in effect overturned the decision of the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). In the *Fuentes* case, the replevin statute in Pennsylvania was held to be unconstitutional because its procedures vi-

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[7] See Pages 8a and 9a Appendix.

[8] See Page 9a, Appendix.

olated the due process clause of the Fourteenth Amendment. The failure of the statute to provide the opportunity for a hearing prior to depriving an individual of property rights was the violation of due process.

Under *Fuentes,supra,* this Court stated that:

> "[T]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. It's purpose . . . is to protect his use and possession of property from arbitrary encroachment . . .", at page 1994, 92 S.Ct.

This right to a due process hearing was later affirmed by the Superior Court of Pennsylvania in *North Penn Consumer Discount Co. v. Shultz* Pa. Super., 378 A2d 1275 (1977). In this case, the Court held that in Pennsylvania:

> "[D]ue process requires that one be given an opportunity to be heard prior to the intrusion upon one's property rights either by the government or by a private party with the assistance of the government., at page 1278.

The Supreme Court of Pennsylvania, in the present case, now permits any legal entity to circumvent the Fourteenth Amendment due process provision by inserting in every contract a clause that authorizes a party to the contract to take possession of another's property without notice, hearing, or without the necessity of proceeding in accordance with the Penn-

sylvania Rules of Civil Procedure.[9] Unless this decision is overturned, landlords and creditors may now intrude upon one's property rights without any state procedures being involved and without any due process protection as guaranteed by the Fourteenth Amendment. The contractual rights of parties can now be resolved by one party seizing and possessing the property of the other upon either party deciding the other is in default.

The result of this decision by the Supreme Court of Pennsylvania is to permit the Respondent to take possession of all Petitioners' equity and rights in the subject property in violation of the due process clause of the Fourteenth Amendment.

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[9] Pennsylvania Rule of Civil Procedure 2971(a) requires a complaint in confession of judgment for possession be filed with the Prothonotary in an action to enter judgment in ejectment for possession real property.

CONCLUSION

Petitioners respectfully submit that the decision of the Supreme Court of Pennsylvania in the present case overrules the *Fuentes v. Shevin* case, *supra*, and effectively circumvents the due process protections provided under the Fourteenth Amendment.

Respectfully submitted,

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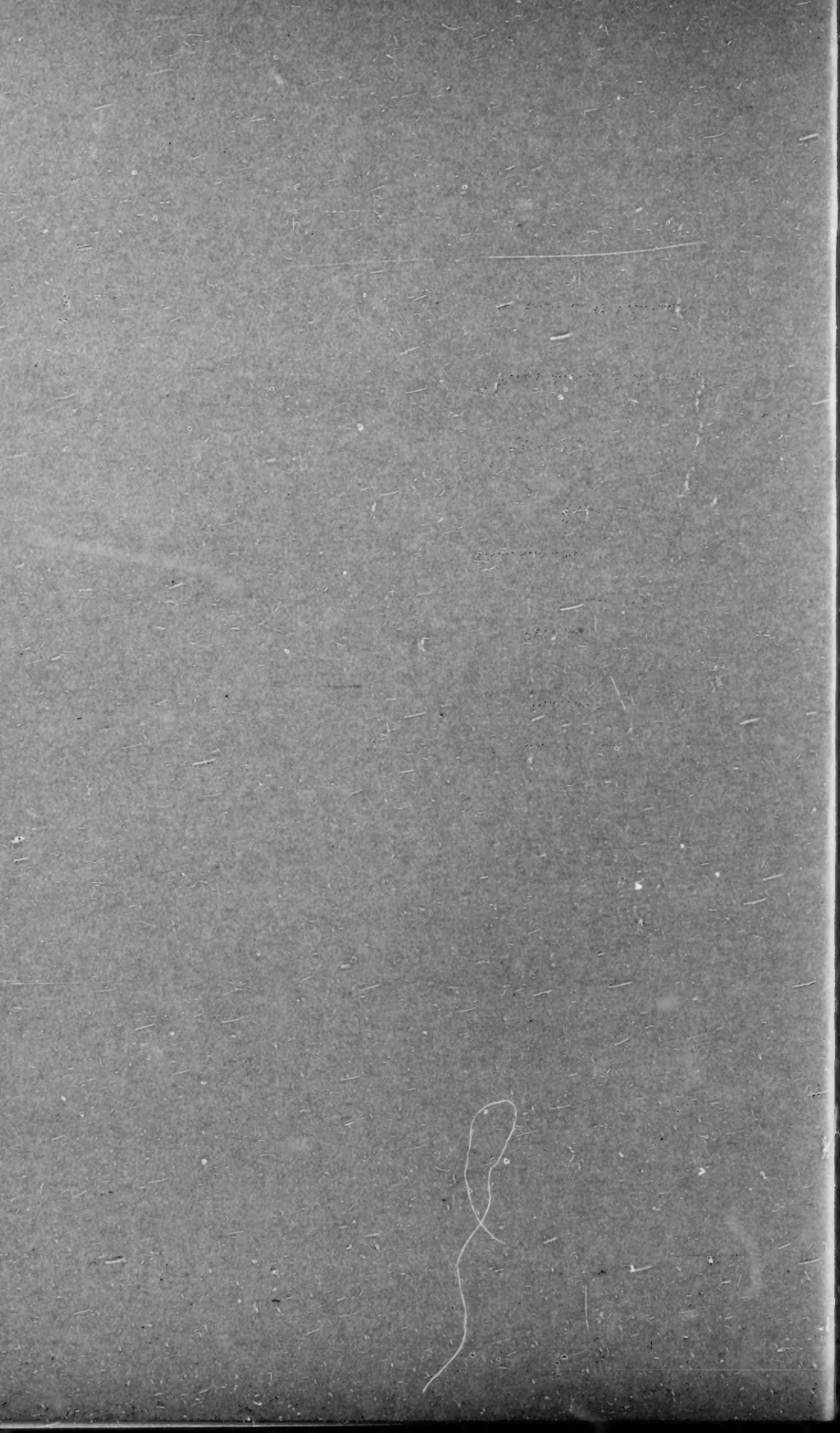
APPENDIX



APPENDIX A

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 61 W.D. Appeal Docket 1985

LOUIS A. MOONEY, d/b/a BETHEL STEEL CO., a Sole Proprietorship, (LOUIS A. MOONEY and NORMA JEAN MOONEY, his wife)

v.

GREATER NEW CASTLE DEVELOPMENT CORPORATION, a Pennsylvania Non-Profit Corporation,

Appellant

Appeal from the Order of the Superior Court in Case No. 01252-PGH-83 dated March 1, 1985, affirming the Order of the Court of Common Pleas of Lawrence County at No. 52 of 1979, in Equity dated September 30, 1983

ARGUED: MARCH 4, 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the SUPERIOR COURT OF PENNSYLVANIA be, and the same is, hereby reversed.

/s/ IRMA T. GARDNER
IRMA T. GARDNER
Deputy Prothonotary

DATED: June 3, 1986

APPENDIX B

[J-32-1986]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 61 W.D. Appeal
Docket 1985

LOUIS A. MOONEY, d/b/a BETHEL STEEL CO., a Sole Proprietorship, (LOUIS A. MOONEY and NORMA JEAN MOONEY, his wife),

Appellee

v.

GREATER NEW CASTLE DEVELOPMENT CORPORATION, a Pennsylvania Non-Profit Corporation,

Appellant

Appeal from the Order of the Superior Court in Case No. 01252-PGH-83 dated March 1, 1985, affirming the Order of the Court of Common Pleas of Lawrence County at No. 52 of 1979, in Equity dated September 30, 1983

ARGUED: MARCH 4, 1986

OPINION OF THE COURT

JUSTICE ROLF LARSEN FILED: JUNE 3, 1986

Greater New Castle Development Corporation (GNCDC) appeals from an order of the Superior Court affirming an adjudication and final decree in equity of the Court of Common Pleas of Lawrence County. The final equity decree fashioned by the trial court declared that appellant GNCDC holds, as the trustee of a resulting trust for the

benefit of the appellee Louis A. Mooney, certain real estate conveyed to it by the appellee. The lower court found the existence of a resulting trust and a trust relationship between GNCDC and appellee Mooney based upon a transaction between the parties pursuant to the Pennsylvania Industries Development Authority Act, 1956, May 17, P.L. (1955) 1609 § 1 et.seq., 73 P.S. § 301, et.seq. The appellant was ordered to account to the appellee for all monies received as rent or otherwise from the premises that appellee conveyed to the appellant. In addition, it was ordered that at such time as all creditors are fully satisfied, appellant is to reconvey the property to the appellee. The court also ordered that in the event of a mortgage foreclosure, a complete accounting is to be provided to appellee, and all monies received by appellant in excess of appellee's obligation to appellant are to be paid over to appellee. Because we find that the lower court erred in holding that appellant GNCDC is the trustee of a resulting trust, we reverse.

The facts agreed to by the parties and submitted to the trial court upon stipulation established the following: The appellee conducted business as a sole proprietor in Lawrence County under the registered fictitious name of Bethel Steel Co. In 1970, appellee was seeking to obtain low interest loan funds for infusion into his business. He sought the assistance of the appellant GNCDC. Appellant agreed to become involved in the project and arranged to secure financing under the provisions of the Pennsylvania Industrial Authority Act, *supra.* In October, 1970, the appellee along with his wife, Norma Jean Mooney, conveyed to the appellant, GNCDC, a certain tract of real estate situate in Shenango Township, Lawrence County, Pennsylvania upon which was located appellee's business. A general warranty deed reciting a consideration of $5,000.00 was delivered to appellant and recorded in the Recorder's Office of Lawrence County. The parties agreed that the purpose of the conveyance of the real estate to GNCDC "was to enable [appellee] Louis A. Mooney, doing business as Be-

thal Steel Co., to receive the benefits provided for under the Pennsylvania Industrial Authority Act, said conveyance being a part of the required procedure in order for financial assistance to be available under the said Act." (Stipulation of Facts No. 4). As part of the transaction, GNCDC made application to the Pennsylvania Industrial Development Authority (PIDA) for financing of appellee's project.[1] PIDA financing would enable appellee to obtain a favorable interest rate on loan monies he needed for the proposed project.

Shortly after the appellee conveyed the property to GNCDC, appellee and GNCDC executed a lease whereby appellant leased the premises back to the appellee for a term of fifteen (15) years. The appellee agreed to pay a total rental of $231,283.30, payable at the rate of $1,284.91 a month, and to pay all annual taxes, insurance premimums and all other annual charges and assessments.

At the time of the conveyance and lease arrangement, appellant executed a first mortgage and mortgage note in favor of six financial institutions in the amount of $80,000.00 at an interest rate of nine (9%) percent per annum.[2] Also, at the same time, appellant executed a second mortgage and mortgage note payable to PIDA in the amount of $64,000.00 at an interest rate of four (4%) percent per annum. Both mortgages were for fifteen (15) year terms and paralleled the fifteen (15) year term in the

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[1] Under the provisions of the Industrial Development Authority Act, only an Industrial Development Agency, as defined by the Act, may apply for a loan in connection with an industrial development project. 73 P.S. § 306.

[2] The mortgage document recorded in the Recorder's Office of Lawrence County identified the mortgagor as the appellant Greater New Castle Development Corporation and the mortgagee as First Federal Savings and Loan Association of New Castle, First National Bank of Lawrence County, Lawrence Savings and Trust Company, Peoples Bank of Western Pennsylvania, The Citizens National Bank of New Castle and Dollar Savings Association.

lease between appellant and appellee. The total of the monthly payments under the two mortgages corresponded to the monthly rental payment under the lease. Further, at the time of the conveyance, mortgage and lease, the parties anticipated that appellant would convey the premises back to the appellee after appellee completed full performance of all conditions under the terms of the lease.

In 1977, the appellee began to experience financial difficulties in his business and he defaulted on his lease. He made no rental payment after December 1, 1977, and he failed to pay the real estate taxes due on the premises for the year 1978. In February, 1979, appellant notified the appellee in writing that because of appellee's default in rental payments, and his failure to pay the taxes and keep the premises in repair, the lease between the parties was terminated. The appellant, using self-help, had taken possession of the property prior to February, 1979 and, after delivering the written notice of termination, re-let the premises to another tenant. Following the dispossession of appellee and the termination of his lease, appellee filed a complaint in equity against GNCDC seeking, inter alia, an order declaring that appellant held the subject property as trustee of a resulting trust for the benefit of appellee. The lower court granted appellee the relief he requested and the Superior Court affirmed. Upon the petition of GNCDC, we granted allocatur.

> A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of.

Policarpo v. Policarpo, 410 Pa. 543, 189 A.2d 171 (1963); *Restatement Trusts, 2nd Edition* § 404. In this case, con-

sidering the circumstances existing at the time of the conveyance to appellant, the question presented is whether there is an inference that the parties intended that appellant have no beneficial interest in the subject property? We are not dealing with a question of an express trust, so it is not necessary for appellee to prove a manifest intent to create a trust. It is necessary though for appellee to produce evidence showing circumstances which raise an inference that in making the conveyance to the appellant, there was no intention to give appellant the beneficial interest in the property. "A resulting trust is imposed for the purpose of carrying out what it appears from the circumstances under which a disposition of the property is made would probably have been the intention of the person making the disposition if he had thought of the matter." *Restatement, trusts 2nd Edition,* Chapter 12, Introductory Note. A resulting trust arises from the character of the transaction which permits an inference that the parties intended that the transferee not have the beneficial interest in the property conveyed rather than from a declaration of that intention.[3]

The appellant argues that the trial court erred, as a matter of law, in finding that the parties intended that appellee retain the right to the beneficial interest in the subject property. Appellant contends that no circumstance exists in this case which raises an inference that GNCDC should not have the beneficial interest in the property conveyed to it. We agree. The parties stipulated that the purpose of the conveyance from appellee to appellant was to enable appellee to obtain financing from PIDA. This procedure

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[3] A typical instance of this kind of transaction is "where a transfer of property is made to one person and the purchase price is paid by another person." *Restatement Trusts, 2nd Edition* § 440; *McHenry v. Stapleton,* 443 Pa. 186, 278 A.2d 892 (1971). Another is where property is gratuitously transferred with the intention of creating an express trust but the trust fails. *Restatement Trusts, 2nd Edition* § 411. Neither is the case here.

was required in order for financing assistance to be available under the Act. The Act provides that PIDA loans may only be made to industrial development agencies such as the appellant. 73 P.S. § 306. The Act further provides that any such loan made by PIDA "shall be secured by bond or note of the industrial development agency and by mortgages on the industrial development project for which such loan was made." 73 P.S. § 306(e). In order for the project in this case to be financed with a low interest PIDA loan, it was essential that appellant own the property upon which the project was to be developed. Ownership was necessary so that appellant could execute a mortgage to secure the loan obtained from PIDA. To accomplish this end, appellee conveyed *all* of his right, title and interest in the subject property to appellant. There was no limiting conditions, reservations, provisos or stipulations to the contrary contained in the deed. Having ownership of the property, appellant then was able to execute mortgages and obtain the desired financing. This was the plain intent of the parties when the conveyance was made to the appellant.

> One who seeks to establish the existence of a resulting trust bears a heavy burden of proof; the evidence must be "clear, direct, precise, and convincing." *Policarpo v. Policarpo,* 410 Pa. 543, 189 A.2d 171 (1963); *see also Wosche v. Kraning,* 353 Pa. 481, 46 A.2d 220 (1946); *cf. Sayre Estate,* 416 Pa. 386, 206 A.2d 301 (1965). This Court had held that "unless the evidence of the existence of an oral trust is of the highest probative value, equity should not act to convert an absolute ownership into an estate of lesser quantity." *Sechler v. Sechler,* 403 Pa. 1, 7, 169 A.2d 78, 81 (1961). The facts and circumstances from which a court may find a resulting trust should be of no lesser probative value.

Masgai v. Masgai, 460 Pa. 453, 333 A.2d 861 (1975). The evidence here falls short of meeting the required burden of proof to establish a resulting trust. The circumstances simply are insufficient to raise an inference that the appellant was not to have the beneficial interest in the subject premises.

The appellee argues unconvincingly that the facts arising in this case establish the creation of a resulting trust. In support of his argument, appellee points to: (1) the agreed purpose of the conveyance to appellant, namely, to enable appellee to obtain financing with PIDA, and (2) the fact that the parties anticipated a reconveyance of the property to appellee after full compliance with all of the terms of the lease. Neither of these circumstances suggest that the parties intended that appellant have no beneficial interest.

In order for appellee to obtain the desired benefits of low interest business financing through a PIDA loan, the subject property had to be owned by the appellant. This fact alone does not raise the inference necessary for a resulting trust to emerge. Considering the conveyance to appellant and the lease that was executed, the parties intended that appellant be vested with absolute title. There is nothing in the Act or in the agreement between the parties that suggests otherwise. The Act does not provide for a reconveyance of the real estate by an industrial development agency to the transferor who benefits from the loan between the agency and the authority. Such a reconveyance could be provided for by appropriate provisions in the agreement between the agency and the transferor. In this case, the evidence fails to establish the parties agreed to such provisions. But, even if such agreement was found to exist in the instant case, this would not automatically confirm circumstances creating a resulting trust. It would merely establish a contractual right on the part of the appellee to have the property reconveyed to him upon his compliance with the terms of the agreement, which, in this case, is the lease. The parties stipulated,

and the lower court by adopting the stipulation found, that the parties anticipated that the property would be reconveyed to appellee *if* he met and performed all the conditions and terms of the lease. Quite clearly, this proviso was not met. The appellee failed to discharge his duties and obligations under the lease and, therefore, even if he had a contractual right to a reconveyance conditioned upon fulfilling the provisions of the lease, that right was lost. Under the circumstances there are no facts to suggest that the appellee is entitled to a reconveyance of the property notwithstanding his failure to meet and perform the conditions of the lease agreement. The appellee cannot have it both ways.

The order of the Superior Court is reversed.[4]

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[4] The appellee raises an additional argument that his due process rights under the Fifth and Fourteenth Amendments of the U. S. Constitution were violated by the manner in which appellant took possession of the subject premises. The Superior Court refused to decide this question because it was not set forth in the statement of questions involved as required by Pa.R.A.P. 2116; and therefore, it was not properly before that court. For this reason we will not consider the question.

APPENDIX C

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 1252 Pittsburgh 1983

LOUIS T. MOONEY, d/b/a BETHEL STEEL CO., A SOLE PROPRIETORSHIP, (LOUIS A. MOONEY AND NORMA JEAN MOONEY, HIS WIFE)

v.

GREATER NEW CASTLE DEVELOPMENT CORPORATION, A PENNSYLVANIA NON-PROFIT CORPORATION,

Appellant

ORDER

AND NOW, this 1st day of MARCH, 1985, it is ordered as follows:

_X_ Order affirmed.

____ Order reversed.

____ Judgment affirmed.

____ Judgment of Sentence affirmed.

____ Judgment of Sentence reversed.

____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

____ Order modified as set forth in opinion filed herewith.

____ Costs to be taxed as provided by Chapter 27 of the Pa. R.A.P.

____ Costs to be taxed as provided in opinion filed herewith.

—— Appeal quashed.

BY THE COURT

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

IN THE SUPERIOR COURT OF PENNSYLVANIA
Pittsburgh Office

No. 01252 Pittsburgh, 1983

LOUIS T. MOONEY, d/b/a BETHEL STEEL CO., A SOLE PROPRIETORSHIP, (LOUIS A. MOONEY AND NORMA JEAN MOONEY, HIS WIFE)

v.

GREATER NEW CASTLE DEVELOPMENT CORPORATION, A PENNSYLVANIA NON-PROFIT CORPORATION,

Appellant

Appeal from the Order of the Court of Common Pleas,
Lawrence County, Civil Division,
at No. 52 of 1979.

BEFORE: BROSKY, TAMILIA and ROBERTS, JJ.

PER CURIAM: FILED: MARCH 1, 1985

Order affirmed.

IN THE SUPERIOR COURT OF PENNSYLVANIA
Pittsburgh Office

No. 01252 Pittsburgh, 1983

LOUIS T. MOONEY, d/b/a BETHEL STEEL CO., A SOLE PROPRIETORSHIP, (LOUIS A. MOONEY AND NORMA JEAN MOONEY, HIS WIFE)

v.

GREATER NEW CASTLE DEVELOPMENT CORPORATION, A PENNSYLVANIA NON-PROFIT CORPORATION,

Appellant

Appeal from the Order of the Court of Common Pleas Lawrence County, Civil Division, at No. 52 of 1979.

BEFORE: BROSKY, TAMILIA and ROBERTS, JJ.

MEMORANDUM:

This appeal is from the order dismissing appellant's exceptions to an order which found a resulting trust and directing entry of that order as a final decree. Appellant contends that: (1) there was no basis in the parties' stipulation of facts on which the lower court could have imposed a resulting trust; and (2) certain factual findings of the court below were not consistent with the parties' stipulations.[1] We disagree with appellant and, accordingly, affirm the order of the lower court.

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[1] Appellant, in the argument section of his brief, raises a third issue concerning the procedure it followed in retaking the premises in question. However, this issue was not raised nor suggested in appellant's Statement of Questions Involved. Therefore, we will not consider it. See Pa.R.A.P. 2116 (a); *Hess v. Hess*, ___ Pa. Super. ___, A.2d 796 (1984).

After a careful and thorough review of the record, the briefs of the parties, and the applicable law, we conclude that the opinion of the lower court accurately summarizes the history of this case and adequately disposes of appellant's first contention. As to appellant's second contention, our review of the record indicates that the lower court's factual findings were based substantially upon the parties' stipulations. To the extent that they were not so based, we find that they were not a factor in the lower court's decision.

Accordingly, the order of the lower court is affirmed.

APPENDIX D

IN THE COURT OF COMMON PLEAS LAWRENCE COUNTY, PENNSYLVANIA CIVIL DIVISION~~EQUITY~~

No. 52 of 1979

LOUIS A. MOONEY, d/b/a BETHEL STEEL CO., a sole proprietorship, (LOUIS A. MOONEY and NORMA JEAN MOONEY, his wife),

Plaintiff

Vs.

GREATER NEW CASTLE DEVELOPMENT CORPORATION, a Pennsylvania non-profit corporation,

Defendant

ADJUDICATION

CAIAZZA, J. June 28, 1982

I

Chronological Statement of Facts

In 1970, the plaintiff, Louis A. Mooney, entered into an agreement with the Greater New Castle Development Corporation, referred to hereafter as GNCDC, which provided that Mr. Mooney was to convey certain specified real estate to the GNCDC. In turn, and by agreeing to engage in this procedure, he would put into operation the mechanisms enabling the GNCDC to obtain financing from the Pennsylvania Industrial Development Authority, referred to hereafter as PIDA. The Pennsylvania Industrial Development Authority Act, Act of May 17, 1956, P.L. (1955) 1609 Section 1 (73 P.A. 301 *et seq.*), referred to hereafter

as the Act, provides that PIDA loans can only be made to an industrial development agency. *See* Section 6 of the Act (73 P.S. 306).

Subsequent to the execution of the deed and property transfer, the GNCDC entered into a mortgage relationship with several lending institutions[1] and with PIDA. Following the execution of the financial arrangements, GNCDC then leased the premises to Mr. Mooney for a term and payout period identical to the mortgage obligations of GNCDC to the financial institutions and PIDA. Financial difficulties for Bethel Steel apparently erupted in mid-1970 and as a consequence thereof, Mr. Mooney entered into an agreement to sale the premesis. The potential purchasers were apparently permitted to take possession of the property for a brief period however, the sale was never consumated, which prompted the plaintiff to seek additional financing in support of a new business venture. Those efforts were stymied and on November 7, 1978, Mr. Mooney received notice that GNCDC had taken possession of the premises pursuant to the lease terms. However, the month following, i.e. December 1978, Mr. Mooney attempted to obtain financing from the Farmer's Home Administration.[2]

On February 21, 1979, GNCDC informed Mr. Mooney that his lease was terminated and subsequently, on February 21, 1979, notified him of the total amount of money due pursuant to the lease, including both rent and taxes.

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[1] First Federal Savings and Loan Association of New Castle; First National Bank of Lawrence County; Lawrence Savings and Trust Co.; Peoples Bank of Western Pa.; the Citizens National Bank of New Castle; and Dollar Savings Association.

[2] On page 13 of plaintiff's statement of the case he states that the loan application with Farmer's Home Administration was favorable; however, the loan was apparently never fully effectuated.

GNCDC then took possession of the premises and relet the property to another business enterprise.[3]

Mr. Mooney then commenced the instant action for equitable relief, alleging that (1) the GNCDC holds the premises in trust for the use and benefit of the plaintiff; (2) that an accounting should be made relating to all monies raised out of the reletting of the property; (3) that a determination should be made of the plaintiff's equity in the premises; and, (4) that the premises should be returned to the plaintiffs upon payment in full of Mr. Mooney's financial obligation.

II

Issue

Does the defendant own the beneficial interest in the premises, or does a trust relationship exist between the plaintiff and the defendant.

III

Discussion

The plaintiff bottoms the theory of his case on the creation of one of either two distinct trusts; that is, the involvement of either a resulting trust or a constructive trust. The defendant counters with the argument that the purpose of the transfer of the property to the defendant was to create a fee ownership in the GNCDC and that no provision of the Industrial Authority Act creates an equitable interest in the tenant nor does the Act in any manner seek to protect the tenant.

Here, there was no express agreement not was there an express obligation on the part of GNCDC to re-convey

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[3] According to the record here, GNCDC did not proceed to take possession by an action of ejectment nor have they commenced an action against the plaintiff for monies due under the lease.

the premises to the plaintiff. However, it is inconceivable, or perhaps foolhardy, to believe that the purpose of the original property transfer from the plaintiff to the defendant was meant to convey an unconditional fee interest in the GNCDC. Each of the parties, prior to the consummation of the loan proceedings, assumed the obligation of voluntarily placing themselves in a position to accomodate the standards of the Act, viz, that PIDA is only authorized to make loans to industrial development agencies. GNCDC is an industrial development agency; Bethel Steel Corp. was not an industrial development agency. A marriage of convenience was struck and the plaintiff's property was conveyed to GNCDC to accomodate the mandates of the Act.

To supplement the agreement and to reconcile the purpose of the transfer with the intent of the parties, a lease arrangement was executed, whereby the lease term corresponded to the payout period and the monthly lease payments equalled the mortgage payment obligations under the two mortgages.

Also, Exhibit "G" attached to the stipulations of fact, introduces another anomalous factor here. The consideration provided for in the contract for sale is $390,000.00,[4] which apparently must bear, in the least, some resemblance to the value of the property. The loan proceeeds were $144,000.00. The stated consideration on the face of the deed is $5,000.00. If, in fact, the parties intended the unconditional transfer of the fee interest, more precise and exacting attention would obviously have been given to the terms of the sale.

Even disregarding the figures presently before the Court and assuming further, arguendo, that the consideration set

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[4] Exhibit "G" is an agreement of sale between Louis A. and Norma Jean Mooney as sellers and Joe Cioffi as buyer. The stated consideration was $390,000.00 net to sellers. GNCDC was not a party to this agreement.

forth in Exhibit "G" bears no resemblance to the market value of the property, it would be unconscionable to expect a GNCDC borrower to unconditionally relinquish title to his property in order to obtain financing to expand his business horizons. In many instances it would be a giant step backwards, especially when the amount financed is substantially less than the true market value of the property. Common sense dictates; and the intention of the parties at the time the agreement was reached, should also dictate. Clearly, Mr. Mooney expected the property to be reconveyed to him if he successfully met and discharged the stipulated terms of the lease. Likewise, and with equal candor, the GNCDC would have accomodated Mr. Mooney by returning the legal interest in the property to him, upon successful termination of the lease terms.

Consequently, the Court here finds that had the plaintiff successfully met the lease requirements, the property would have been reconveyed to him at the termination of the lease term.

What, then, is the relationship between the plaintiff and the defendant.

"A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein. . ." Restatement (2d) Trusts, § 404 (1959) [hereafter Restatement]. .

The quality of evidence required to prove an oral trust must be "'clear, direct, precise and convincing.'" *Petro v. Secary Estate,* 403 Pa. 540, 543, 170 A.2d 325 (1961); *see Moffitt v.* Moffitt, 340 Pa 107, 110, 16 A.2d 418, 419 (1940). Also, the Supreme Court of Pennsylvania in *Sechler v. Sechler.* 403 Pa. 1, 7, 169 A.2d 78, 81 (1961) stated that "unless the evidence equates this standard, a parol trust cannot be established. The reason for the rule is evident: unless the evidence of the existence of an oral

trust is of the highest probative value, equity should not act to convert an absolute ownership into an estate of lesser quality."

Obviously, if the individual who attempts to establish a resulting trust shows that he, in fact, paid the consideration for the property directly to the grantor, and title was taken in the name of a third party, such payment lays the proper foundation for the establishment of a resulting trust. However, all cases are not that simple. In many instances, as is the present situation, there is a loan by the grantee to the resulting trust claimant, and the grantee stipulates (impliedly in this case) that the fee interest which he was obtained is simply held as security. Thus, he enters into an agreement for a mortgage, which is oral in nature.[5]

Here, the GNCDC loaned money to the plaintiff, and the plaintiff agreed that the GNCDC would hold the land as security. "A resulting trust arising by payment of the purchase money may be adjudged or decreed, though the holder of the legal title himself paid the purchase price, if it appears by clear, precise and indubitable evidence, that he did so by reason of a prior agreement with the cestue que trust, who is to repay him at some time in the future." *Lukens v. Wharton Ave. Baptist Church,* 296 Pa. 1 (1929). *Cf Kaufman v. Kaufman,* 266 Pa. 270, 276 (1920). Also, the trustee may be the entity making payment, where, as here, the payment is made by way of an agreement which provides for a repayment of the monies advanced to the resulting trust claimant. *Cook v. Cook,* 69 Pa 443, 447-8 (1971); *Schrager v. Cool.* 221 Pa. 622, 625 (1908). There are also Pennsylvania cases giving rise to a resulting trust in which the trustee agrees at the time he

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[5] *See* Howard, "Resulting Trusts—an exception to the Statute of Frauds," 3 Southwestern L.J. 191; *cf Cobb,* "Resulting and Constructive Trusts in Realty," 1 Baylor L.Rev. 296; Restatement, Second, Trusts and the Statute of Frauds, 6 Col. L.Rev. 326.

obtains title that the entity or person for whom he was holding title would repay the puchase money in installments. *Gilchrist v. Brown,* 165 Pa. 275, 283 (1895); *Kaufman v. Kaufman, supra; cf Kern v. Smith,* 290 Pa. 566 (1927).

> The transaction (such as in the instant case) is often called by the courts 'a resulting trust by way of a mortgage.' It would seem that essentially it is the creation of a resulting trust, and then the oral mortgage of the beneficiary's equitable interest under that resulting trust to the resulting trustee to secure performance of the promise to repay the loan. It is a resulting trust and a mortgage combined.

See Bogert, Trusts & Trustees, 2nd edition. § 455 p. 652.

IV

DECREE NISI

The defendant, Greater New Castle Development Corporation holds the property of the plaintiff as the trustee of a resulting trust, subject to the terms of the agreement existing between Louis A. Mooney and the Greater New Castle Development Corporation. The defendant is hereby directed to account to the plaintiff for all monies obtained from any rentals received emanating from the use of the premises.

At such time and in the event that all creditors become whole in this matter, without the institution of a mortgage proceeding, the defendant, GNCDC, is then directed to reconvey the property to the plaintiff or his heirs.

In the event that a mortgage foreclosure proceeding is processed to its conclusion and monies are derived therefrom, a complete accounting is to be provided for the benefit of the plaintiff or his heirs, and all monies received

in excess of the plaintiff's obligation to the defendant are to be paid to the plaintiff or his heirs.

BY THE COURT:

/s/ Francis X. Caiazza
J.